BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

COLUMBUS GUFFIN, JR. Claimant VS. **CITY OF FORT SCOTT** Respondent AND **HARTFORD ACCIDENT & INDEMNITY COMPANY** Insurance Carrier AND **WORKERS COMPENSATION FUND**	)	Docket No. 160,839

ORDER

Claimant requests review of Special Administrative Law Judge William F. Morrisey's Award dated July 7, 1994.

APPEARANCES

Claimant appeared by his attorney, David L. McLane of Pittsburg, Kansas. The respondent and its insurance carrier appeared by their attorney, Garry Lassman of Pittsburg, Kansas. The Workers Compensation Fund appeared by its attorney, Brian Johnston of Fort Scott, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The stipulations of the parties are contained in the Award. Likewise, an itemization of the record considered by the Appeals Board is contained in the Award. In addition, the report dated October 27, 1993 from Stephen Leroy Sturdevant, Ph.D., by written stipulation of the parties filed February 10, 1994, will be admitted into evidence.

ISSUES

The Administrative Law Judge found claimant sustained permanent injury and impairment to both lower extremities as the result of a July 3, 1990 work-related accident and awarded claimant permanent partial disability benefits for a 37 percent work disability.

Claimant requested review of that finding and contends claimant injured his back in that accident and is permanently and totally disabled. Respondent contends claimant is entitled to permanent partial benefits for a scheduled injury only to the right leg. Nature and extent of disability is the only issue before the Appeals Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds:

Claimant has failed to prove he sustained permanent injury as the result of a work-related accident occurring on July 3, 1990. Therefore, the Award of the Special Administrative Law Judge should be reversed.

On July 3, 1990, claimant fell through the top of a septic tank and injured his right hip and right elbow. Claimant is unsure if he injured his right knee at that time because it was already painful and claimant was undergoing treatment for an earlier injury to the same knee that occurred in August 1989. That injury was the subject of a separate claim filed in Docket No. 145,149.

Following the fall through the top of the septic tank, claimant initially consulted Robert R. Nichols, M.D., and Douglas P. Weddle, M.D, of Fort Scott, Kansas for treatment. Claimant did not return to work for respondent. At the time of his accident, claimant was employed by respondent to work in the waste water treatment department as a laborer. At a preliminary hearing in March 1991, claimant testified he was unable to return to his former job due to weakness in his legs and knees which he attributed to the August 1989 accident.

Dr. Weddle testified that his associate, Dr. Nichols, saw claimant on July 3, 1990 and that claimant reported he had fallen through the top of a septic tank injuring his right leg and side. Dr. Nichols concluded claimant had a contusion to the right hip and elbow and took claimant off work until July 5. Claimant next saw Dr. Weddle six months later on January 3, 1991 complaining of low back pain that had started about three days earlier. At this visit claimant related the back complaints to an incident he stated had happened approximately a year earlier when he sat down hard and felt pain in his tailbone area. Claimant reported that since that incident he had experienced intermittent tingling in his lower back. After an examination that indicated some low back muscle spasm, mild straightening and a mild limitation of motion of the lumbar spine, and considering x-rays that confirmed an earlier low back fusion and some straightening of the spine, Dr. Weddle diagnosed a low back strain and previous lumbar fusion. Dr. Weddle's office next saw claimant on a follow-up visit on January 30, 1991. At that time claimant related his back pain to the July 3, 1990 fall. After several subsequent visits, Dr. Weddle last saw claimant on May 23, 1991. At that time claimant continued to complain of back pain along with tingling in both the upper and lower extremities. Although he lacks experience in computing functional impairment ratings, the doctor believes claimant has sustained some permanent impairment as a result of the July 3, 1990 accident.

During the period he treated claimant, Dr. Weddle referred claimant to an orthopedic surgeon, Dr. Mark Bernhardt, in Kansas City. Dr. Weddle testified, without objection, that Dr. Bernhardt believes claimant has idiopathic lumbar spine pain with a past history of lumbar disc herniation and post-laminectomy syndrome. Dr. Bernhardt also believed claimant was not a good surgical candidate and should resolve his workers compensation

claim, start an exercise program and try a lumbar corset. The record is unclear whether Dr. Bernhardt believes claimant's complaints were the result of physiological or nonphysiological causes.

When asked about permanent work restrictions, Dr. Weddle testified that claimant cannot sit or stand for prolonged periods; should restrict lifting to no more than 25 pounds; and that he should avoid repetitive motion such as bending, stooping and lifting. On cross-examination, the doctor testified it is hard to relate the back condition to the July 1990 accident if claimant did not develop back pain until six months later.

Respondent presented the testimony of Edward J. Prostic, M.D. Dr. Prostic examined claimant in February of 1991. Claimant's attorney requested the evaluation and did not restrict it to any specific injury or accident date. At the examination, claimant told the doctor about an injury in August 1988 involving a cave-in, a second accident in August 1989 when he was lifting a lawn mower, and a third accident in July 1990 when he fell through the top of a septic tank. Claimant told the doctor he had pain in his right thigh, knee and leg and other problems concerning the right knee. The doctor's notes do not mention complaints to other areas of the body and the doctor does not recall any. As a result of his evaluation, Dr. Prostic diagnosed aggravation of the patella femoral joint of the left knee and anterior cruciate deficit in the right knee which constituted a 17 percent functional impairment to the body as a whole. The doctor believes the left knee problem developed as a result of the right knee injury. Because he did not realize that he would be asked to apportion the impairment that claimant had before and after the July 3, 1990 accident, Dr. Prostic did not elicit the information necessary to formulate that opinion.

The respondent also presented the testimony of orthopedic surgeon Roger W. Hood, M.D. Dr. Hood treated claimant from November 14, 1989 through March 30, 1990. He began treating claimant's right knee after the incident in August 1989 when the right knee popped while claimant was removing a lawn mower from a truck. In December 1989, the doctor performed arthroscopic surgery on claimant's right knee to debride a torn anterior cruciate ligament and resect the anterior horn of the medial meniscus. In February 1990, the doctor released claimant to return to work without restrictions. The doctor limited the treatment to the right knee because claimant's complaints were restricted to that part of the body.

Board-certified orthopedic surgeon John A. Pazell, M.D., also testified. After initially seeing claimant at his attorney's request, he treated claimant from April 1990 through October 1990. Claimant initially complained to Dr. Pazell that despite treatment from Dr. Hood, he continued to experience discomfort in his right knee and that it felt unstable. In June 1990, before the accident involving the septic tank, Dr. Pazell recommended right knee arthroscopic surgery and therapy to be followed by cruciate reconstruction, if necessary. The doctor saw claimant on July 13, 1990, only 10 days after claimant fell through the top of the septic tank. On July 13, claimant's complaints were still limited to the right leg and claimant did not tell the doctor about that incident. However, the doctor noted claimant's right knee symptoms were worse and scheduled arthroscopic surgery for July 30. During that operation, the doctor performed a right partial resection of the torn meniscus and released adhesions that had formed. The surgery performed by Dr. Pazell was in a different area of the knee than where Dr. Hood operated.

Dr. Pazell last saw claimant on October 19, 1990. Although claimant, apparently in June 1990, wrote the doctor a letter stating that he was also experiencing symptoms in

his left leg in addition to the right, he did not complain of low back pain to the doctor during the entire period of treatment. At their last visit, claimant only complained of pain in his knees and claimant did not mention low back complaints. Dr. Pazell released claimant to return to work without restrictions.

Claimant presented the testimony of Kenneth D. Reeves, M.D. who is board-certified in physical medicine and rehabilitation. Dr. Reeves examined claimant in December 1992 and diagnosed fibromyalgia syndrome and myofascial pain syndrome, "contributed to substantially by an event on July 3rd of 1990." Dr. Reeves took a history from claimant that he had no back complaints until July 3, 1990 when he fell through the top of a septic tank landing on his right hip. Claimant told the doctor that he noticed stiffness and soreness within one or two days of the accident and noticed pain down the right leg within a week. Based upon his review of the medical records and history provided, the doctor believes claimant strained his pelvic and low back ligaments at the time of the fall.

As a result of the accident of July 1990, Dr. Reeves believes claimant has sustained a 20 percent functional impairment to the body as a whole based upon the AMA Guides. Because the injured ligaments affect sustained postures in sitting or standing, the doctor recommends claimant limit his sitting or standing to 20 minutes at any one time, avoid repetitive bending, twisting and stooping; avoid climbing; and limit walking to 1 mile or 10 to 15 minutes. Also, claimant should not lift greater than 15 pounds on a frequent basis and lift all items weighing more than 10 pounds holding the item closely to the body. This doctor believes claimant should avoid work of a repetitive, heavy or stationary nature. On cross-examination, the doctor testified claimant has pain in his neck and shoulders which he believes is caused by fibromyalgia and myofascial pain caused by trauma which occurred earlier than July 1990. After reviewing Dr. Reeves' entire testimony, it appears he believes the fibromyalgia claimant developed as a result of the July 1990 fall is limited to the areas of the low back and legs.

This claim and the claim in Docket No. 145,149 were litigated together and were submitted to the Administrative Law Judge for decision on the same evidentiary record. When stipulations were taken at the regular hearing held on August 27, 1992, claimant's attorney announced the parties had agreed Docket No. 145,149 dealt with a scheduled injury only. However, in claimant's submission letter dated February 9, 1994, claimant requested an award in Docket No. 145,149 for a nonscheduled injury to both lower extremities and an award in Docket No. 160,839 for a nonscheduled injury to the back. When the claims were decided, the Special Administrative Law Judge found in Docket No. 145,149 that claimant was entitled to benefits for a scheduled injury to the right knee based upon a 20 percent functional impairment rating. That Award was not appealed. In this claim and docket number the Special Administrative Law Judge found claimant was entitled to benefits for a 37 percent work disability resulting from bilateral lower extremity injuries caused by the July 3, 1990 accident. Although the claimant premised his claim upon an alleged back injury, the Special Administrative Law Judge did not mention that injury in either Award.

In proceedings under the Workers Compensation Act the burden is placed upon the claimant to prove by a preponderance of the credible evidence the various conditions upon which claimant's rights depend. K.S.A. 1990 Supp. 44-501(a). See also Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993). Provisions of the Workers Compensation Act shall be implied impartially to both employers and employees. K.S.A.

1990 Supp. 44-501(g). In determining whether claimant has satisfied his burden of proof the trier of facts shall consider the whole record.

Based upon the entire record, the Appeals Board finds claimant has failed to prove it is more probably true than not that claimant permanently injured his low back as a result of the July 3, 1990 work-related accident. When claimant sought treatment on the date of accident he did not report a low back injury or complaints relating to that area of his body. The Appeals Board finds claimant did not complain of low back pain or other problems involving the low back until January 1991, six months after the July incident and, at that time, told Dr. Weddle his low back pain had started only three days earlier. Although claimant was receiving treatment from Dr. Pazell immediately before and for a period of time after the July 1990 accident, the Appeals Board finds that claimant did not tell the doctor that he had injured his back in the fall or was experiencing any low back complaints. Further, the Appeals Board finds that claimant did not tell Dr. Prostic, the physician selected by claimant's attorney for an evaluation of claimant's injuries, that he had injured his back in any of the three work-related accidents they discussed which included the July 3, 1990 accident. When considering the entire record and the long period of time between the accident and the onset of complaints the Appeals Board is not convinced that it is more probably true than not true that claimant sustained permanent injury to his back as a result of the July 1990 accident.

Based upon the testimony of Dr. Reeves, claimant contends that the septic tank incident must be the cause of claimant's low back problems. The weakness in this contention is that Dr. Reeves premised his opinions upon the belief that claimant had no back complaints until the July 3, 1990 accident. However, claimant testified at his deposition that he was experiencing low back pain and various other symptoms before July 1990 as a result of an accident that had occurred while claimant was shoveling asphalt only three months earlier.

Contrary to the Special Administrative Law Judge, the Appeals Board does not find that claimant sustained injury to his legs as a result of the July 1990 accident. Apparently, the claimant did not believe he did either because he did not litigate the case on that theory. The medical evidence indicates Dr. Pazell was considering additional right knee surgery, including arthroscopy and cruciate reconstruction before the July 3, 1990 accident. Additionally, as early as June 1990 claimant was experiencing symptoms in his left knee. Finally, when the various physicians testified, the parties did not attempt to prove that the septic tank incident caused additional injury to either lower extremity.

Based upon the above, claimant's request for benefits must be denied.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrisey dated July 7, 1994 should be, and hereby is, reversed; that claimant's request for benefits is denied.

The expenses itemized in the Award are assessed one-half to the respondent and one-half to the Workers Compensation Fund, as stipulated.

IT IS SO ORDERED.

Dated this ____ day of January 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David L. McLane, Pittsburg, KS
Garry Lassman, Pittsburg, KS
Brian Johnston, Fort Scott, KS
William F. Morrissey, Special Administrative Law JudgeENDFIELD
Philip S. Harness, Director